

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1607 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? No

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy
of the judgement? No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?
No

DAHYABHAI SHANABHAI

Versus

KANTABEN KANCHANLAL WADIA DECD BY HID HEIRS & L/R'S

Appearance:

MR SH SANJANWALA for Petitioner

MR MG NAGARKAR for Respondent No. 1, 2, 3, 4, 5

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 23/07/98

ORAL JUDGEMENT

1. This is tenant's revision application under
Section 29(2) of the Bombay Rent Act, 1947.

2. Brief facts giving rise to this revision are that

the disputed accommodation along with open land was let out by the respondent to the revisionist on monthly rent of Rs.18/-. The tenant fell in arrears of rent since 1.11.1974. Notice of demand was served on the tenant on 3.10.1976. Upon receipt of notice the tenant submitted reply and also paid the rent as claimed in the notice. The suit for eviction was, however, filed on two grounds, viz. change of user of the disputed accommodation from residential to commercial also and on ground that the tenant has acquired alternative suitable accommodation for his residence.

3. The Suit was resisted by the revisionist.

4. The trial Court found that the landlord's plea of change of user was not established and that the decree for eviction on ground of arrears of rent also could not be passed. The trial Court, however, on evidence on record found that the tenant has acquired alternative suitable accommodation for his residence. As such decree for eviction, arrears of rent and mesne profit was passed.

5. An Appeal was preferred which was also dismissed. Hence this revision.

6. The finding of two courts below is that there was no arrears of rent existing on the date of service of notice of demand which was not paid within a month of service of said notice. Since the rent was paid by the tenant within a month of service of notice and notice was replied, the decree for eviction was rightly refused on this ground.

7. The finding of the two courts below regarding change of user is a finding based upon proper appreciation of documentary evidence on record. Special care was taken by the two courts below to take into consideration the stipulation contained in the Rent Note.

8. So far as acquisition of suitable alternative accommodation by the tenant is concerned this finding is also a finding of fact recorded by the two courts below. The lower Appellate Court has discussed in detail the nature and extent of alternative accommodation which was acquired by the revisionist on hire purchase basis. It was also considered by the lower Appellate Court how much members are there in the family of the tenant. It also took into consideration that the wife of the tenant had expired and since the tenant has occupied two rooms and two rooms were available in the alternative accommodation purchased by the tenant on hire purchase scheme the

accommodation was sufficient. For cogent reasons the witnesses examined by the tenant were disbelieved by the lower Appellate Court. Consequently there is no scope for interference on this finding of fact recorded by the lower Appellate Court or by the trial Court.

9. The learned Counsel for the revisionist, however, contended that the premises was taken on rent for residence, but right from the inception of tenancy open land was used for business purpose by the brother of the tenant who was carrying on shop of black smith on the open land and as such Section 13(1)(1) of the Bombay Rent Act will not apply.

10. Section 13(1)(1) of the Bombay Rent Act provides that the landlord shall be entitled to recover possession of any premises if the Court is satisfied that the tenant, after coming into operation of this Act, has built, acquired, vacant possession or been allotted suitable residence.

11. The contention of the learned Counsel for the revisionist has been that this action will be attracted only when the premises was let out for residential purpose and if it was let out for residential purpose coupled with commercial purpose Section 13(1)(1) will not be applicable. He further contended that even if the tenancy was for residential purpose but subsequently a portion of which was used for business purposes by the tenant or by his brother in that event also Section 13(1)(1) will not be attracted because the landlord will be deemed to have waived the terms and conditions of the Rent Note.

12. Having carefully considered these two contentions I find little force in them. There can be no waiver by the landlord of the terms and conditions stipulated in the rent note. There is no averment or proof that fresh rent note was executed after the open land was used for business purpose. There is only one Rent note which was initially executed and this rent note clearly stipulates that the premises was let out for residential purpose and there was restrictive covenant in the rent note that the premises shall be used only for residential purpose and for no other purpose. Since these terms were not changed through a subsequent rent note it will be deemed that initial rent note remains in operation. Accordingly the two courts below rightly concluded that the tenancy was granted for residential purpose only.

13. So far as subsequent use of the portion of

tenanted accommodation, viz. open land for business purpose is concerned it has been found by the lower Appellate Court that since 1974 the defendant's brother started carrying on business of black smith over the open land and not prior to that. This is a finding of fact which cannot be interfered in this revision. In face of this finding it cannot be said that the premises, right from the inception of the tenancy, was being used for residential as well as for commercial purpose. If this is so then the question of waiver of the terms and conditions by the landlord hardly arises. Since the premises was let out only for residential purpose and the revisionist, in the opinion of the two courts below, had acquired alternative vacant accommodation for his personal use Section 13(1)(1) of the Act was rightly applied by the two Courts below and decree for eviction of the revisionist was rightly passed. The Decree for eviction therefore requires no interference. The revision as such is bound to fail.

14. The learned Counsel for the revisionist, however, requested that some reasonable time may be granted to the revisionist to vacate the accommodation. The request is accepted. The revision is dismissed. Parties shall bear their own cost. The revisionist is permitted to vacate the disputed accommodation within a period of six months from today on condition that he shall file usual undertaking to vacate the premises to the landlord within this period and he shall not let out, sub-let or transfer the premises to any one else and shall also continue to pay mesne profit regularly on the third day of each english calender month beside payment of decreetal amount and the cost in the mean time.

sd/-

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